

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

GERALD MCTEAR,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

)  
) Case No. DEMO-02-0031  
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) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD  
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)

**I. INTRODUCTION**

**1.1 Hearing.** This matter came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held at the Monroe Correctional Complex, Superintendent's Conference Room, Monroe, Washington, on October 17, 2003.

**1.2 Appearances.** Appellant Gerald McTear was present and was represented by Terrance Costello, Attorney at Law of Schwerin, Campbell, Barnard, LLP. Morgan Damerow, Assistant Attorney General, represented Respondent Department of Corrections.

**1.3 Nature of Appeal.** This is an appeal from a disciplinary sanction of a demotion for neglect of duty, insubordination, gross misconduct and willful violation of rules and regulations. Respondent alleged that Appellant used an electronic immobilization device (EID) without prior

1 authorization; used excessive force on an inmate; and failed to follow established policies and  
2 procedures while restraining the inmate in a restraint chair.

## 3 4 **II. FINDINGS OF FACT**

5 2.1 Appellant is a permanent employee of Respondent Department of Corrections (DOC).  
6 Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated  
7 thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals  
8 Board on October 2, 2002.

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10 2.2 By letter dated September 13, 2002, Superintendent Robert C. Moore notified Appellant that  
11 he was demoted from his position as a Correctional Sergeant to the position as a Correctional  
12 Officer 2. Mr. Moore charged Appellant with the causes of neglect of duty, insubordination, gross  
13 misconduct and willful violation of published employing agency or department of personnel rules  
14 or regulations. In summary, the letter alleges that Appellant used excessive force on an inmate;  
15 used an electronic immobilization device (EID) without prior authorization; and failed to follow  
16 established policies and procedures while restraining the inmate in a restraint chair.

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18 2.3 Appellant was employed by Respondent in August 1992 as an intermittent Correctional  
19 Officer. In November 1995, Appellant became a permanent Correctional Officer, and he  
20 subsequently promoted to a position as a Sergeant. Appellant was a member of the Special  
21 Emergency Response Team (SERT), and he performed duties as a defensive tactics instructor.  
22 Appellant's personnel file includes a letter of counseling dated February 17, 2002, regarding his  
23 unauthorized use of oleoresin capsicum (OC) on an inmate who was already in restraints and under  
24 the control of two correctional sergeants. The letter directed Appellant to follow appropriate use of  
25 force on inmates.

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2 2.4 On March 29, 2002, Appellant was the Special Offender Unit (SOU) Shift Sergeant. At  
3 approximately 4:25 p.m. Appellant was called to assist in the movement of Inmate S from his cell to  
4 a restraint chair. The issue here is whether Appellant's actions during the movement of an inmate  
5 were appropriate.

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7 2.5 Inmate S was threatening self-harm. Inmate S was handcuffed and was wearing leg  
8 restraints. Appellant's role was to supervise the correctional officers who were escorting Inmate S.  
9 Appellant testified that his actions were appropriate, because the inmate was resisting the  
10 movement and posed a safety risk to the officers. Appellant also claimed that once the inmate was  
11 placed in the restraint chair, he lunged forward to "head butt" Officer Roy McIntyre who was  
12 fastening the inmate's left leg restraints. Appellant presented testimony from Officer McIntyre,  
13 who testified that the inmate was resistant during the movement and "thrashed about" and was  
14 attempting to "twist and back up" in the elevator.

15 2.6 Pursuant to DOC practice, the inmate movement was recorded by a video camera, including  
16 sound. In making a determination of whether Appellant's actions were unnecessary and excessive  
17 or whether they were appropriate under the circumstances, we have reviewed the tape of the  
18 movement. We find that neither Appellant nor Mr. McIntyre's description of the events are entirely  
19 supported by the recording. The Board finds as follows:

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21 2.7 The inmate's was verbally abusive, insulting and offensive, and he was shouting racial slurs  
22 at Appellant. However, Inmate S was not actively resistive or physically violent.

23 2.7 After escorting, the inmate into the elevator, the inmate and the two escorting officers are  
24 visible from the waist up. The inmate continues to yell profanities and racial slurs, Appellant steps  
25 right and his back and shoulders block most of the inmate's body. However, Officer Jason Reese is  
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1 holding the inmate by the right arm and is partially visible. Officer McIntyre is not visible on the  
2 screen.

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4 2.8 Appellant continues to tell the inmate to stop resisting, and he places his hand on the  
5 inmate's back. When Appellant asks, "Is he pushing back?" Officer McIntyre responds in the  
6 affirmative. However, Officer Reese's stance is not tense nor does he appear to be bracing himself  
7 or struggling to maintain a hold of the inmate, which would be indicated if the inmate was  
8 physically resisting, moving or thrashing around. Appellant did not alert the officers that he was  
9 going to drop the inmate, which caused the inmate to fall forward with a forceful impact. When  
10 Appellant leans down to pull the inmate's ankle cuffs, there is no physical movement from the  
11 inmate to support that he was pushing back.

12 2.9 After the inmate was brought back to his feet and escorted out of the elevator, he was  
13 directed to sit on the restraint chair. Procedures for securing an inmate in a restraint chair require  
14 that the inmate's shoulders be restrained prior to securing the ankle restraints. However, Appellant  
15 directed Officer McIntyre to secure the inmate's his ankles prior to restraining his shoulders. This  
16 allowed the inmate mobility of his upper body as he continued to be verbally abusive. Although the  
17 inmate leaned forward in an angry manner to yell, the tape does not support the inmate was  
18 attempting to "head butt" Officer McIntyre.

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20 2.10 When Appellant initially arrived at the scene, he was carrying an electronic immobilization  
21 device (EID) from an incident he responded to immediately prior to being asked for assistance with  
22 Inmate S. When the inmate leaned forward yelling, Appellant used the EID device on him.  
23 Appellant did not have prior authorization to use the EID on Inmate S.

1 2.11 Respondent has adopted Policy 410.200, which outlines authorized use of force and use of  
2 force techniques. The policy instructs officers to exercise good judgment and to use only the  
3 amount of force necessary to resolve an incident and provides that the level of force used must be  
4 directly related to the degree of resistance and/or level of threat presented by the offender.

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6 2.12 DOC Policy 410.210 requires authorization from the Superintendent or a designee prior to  
7 using an EID on an inmate.

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9 2.13 Appellant was aware of the department's policies.

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11 2.14 Robert C. Moore, Superintendent of the Monroe Correctional Complex, was Appellant's  
12 appointing authority. Mr. Moore reviewed the videotape, reviewed the information in the ECR,  
13 including the supervisor's report, and conducted an administrative hearing. During the  
14 administrative hearing Appellant was given an opportunity to respond to the charges. Mr. Moore  
15 concluded that Appellant's actions were excessive and unnecessary given the lack of resistance  
16 from the inmate. Mr. Moore concluded that the inmate was not combative or posing a threat to staff  
17 or others. Mr. Moore further concluded that Appellant's use of the EID was not approved and was  
18 punitive because the inmate was reasonably restrained and was not attempting to head butt the  
19 officers.

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21 2.15 In determining the level of discipline, Mr. Moore considered the prior letter of concern  
22 regarding Appellant's excessive use of force, Appellant's knowledge regarding the use of force  
23 policy and procedures, and his role at a supervisory level as a role model for other officers.  
24 Although Mr. Moore considered other forms of discipline, he ultimately concluded that demotion  
25 was appropriate.

### III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant's use of force was not appropriate. Respondent asserts that Appellant violated agency policies and procedures and disregarded a previous directive regarding use of force. Respondent contends Appellant did not fulfill the duties and responsibilities of his position as a sergeant, particularly when he employed excessive force to control an inmate who was reasonably restrained and did not pose a danger to others. Respondent asserts Appellant not only received proper training in procedures and techniques in use of force, but he also was responsible for training others. Respondent asserts that Appellant could not be trusted to act appropriately when responding to inmates and, therefore, demotion is appropriate.

3.2 Appellant argues his actions were appropriate and did not violate DOC policies or procedures. Appellant asserts he had a duty to exercise his judgment and follow the rules, but more importantly, he had a duty to ensure the safety and care of not only inmates, but also other staff. Appellant contends he made a judgment call based on the circumstances at the time and the institution is now second-guessing his actions. Appellant contends that the inmate was posing a threat to others, was attempting to head butt an officer and his use of the EID was appropriate to prevent harm to a staff member. Therefore, he contends that his appeal should be granted.

### IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible

1 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
2 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
3 Corrections, PAB No. D82-084 (1983).

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5 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her  
6 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
7 of Social & Health Services, PAB No. D86-119 (1987).

8  
9 4.4 Respondent has proven by a preponderance of the credible evidence that neglected his duty  
10 when he employed poor judgment and exceeded the level of force necessary, under the  
11 circumstances, during the movement of Inmate S. Furthermore, not only did Appellant fail to notify  
12 the officers that he was going to take down the inmate, but he also pulled Inmate S's leg chains  
13 when there was no indication that the inmate was acting out violently. Appellant also neglected his  
14 duty to ensure the inmate's shoulders were restrained prior to directing the officers to restrain his  
15 ankles.

16  
17 4.5 Willful violation of published employing agency or institution or Personnel Resources  
18 Board rules or regulations is established by facts showing the existence and publication of the rules  
19 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
20 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &  
21 Health Services, PAB No. D93-053 (1994).

22  
23 4.6 Respondent has met its burden by proving by a preponderance of the credible evidence that  
24 Appellant's use of unnecessary force against Inmate S willfully violated DOC policies. Moreover,  
25 Appellant's use of the EID on Inmate S was not approved and was not reasonable under the

1 circumstances. Therefore, Appellant willfully violated the agency's policy when he engaged in an  
2 unauthorized use of the EID and when he failed to exercise discipline, caution, restraint and good  
3 judgment in the use of the EID.

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5 4.7 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to  
6 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

7  
8 4.8 Appellant's poor judgment when he pulled the inmate's leg restraints and his use of the EID  
9 on the inmate were unwarranted and could have caused injury to the inmate. As a senior officer  
10 with many years of experience, Appellant should have employed less punitive measures to  
11 deescalate the inmate's disruptive and verbally abusive demeanor. Respondent has proven that  
12 Appellant's actions were flagrant and constituted gross misconduct.

13  
14 4.9 In determining whether a sanction imposed is appropriate, consideration must be given to  
15 the facts and circumstances including the seriousness and circumstances of the offense. The penalty  
16 should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent  
17 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.  
18 Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

19  
20 4.10 In determining the level of discipline, we have considered Appellant's length of service, the  
21 prior warning he received, and the nature of his actions during the movement as well as Appellant's  
22 response to the charges. Appellant failed to present mitigating factors for why the demotion should  
23 be reversed. The discipline is warranted, and the appeal should be denied.



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**V. ORDER**

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Gerald McTear is denied.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

\_\_\_\_\_  
Walter T. Hubbard, Chair

\_\_\_\_\_  
Gerald L. Morgen, Vice Chair

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